REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 169 OF 1999

RUKIMA ESTATES LTD…………………………………….....PLAINTIFF

VERSUS

DAWNING AGENCIES…………………………………1ST DEFENDANT

AGRICULTURAL FINANCE CORPORTATION…..…..2ND DEFENDANT

RULING

The application has been brought through Notice of Motion under Order XVI Rules 5 (d) of the Civil Procedure Rules, Section 3 and Section 3 (A) of the Civil Procedure Act and all other enabling provisions of the law. The application seeks the following Orders:

- *That the suit herein be dismissed for want of prosecution.*

- *That the costs of this application be for the applicants in any event.*

The application has been supported by the annexed affidavit of Joel Mbaluka and the following grounds; that were argued by Mr. Odongo for the 1st and 2nd defendants. According to Mr. Odongo, the plaintiff filed the suit on 19th April, 1999. That is a period of about 6 years. On the same day, the plaintiff filed a chamber summons application which sought injunctive orders against the defendants, their agents and servants from effecting a transfer of the plaintiff's tractor Registration No. KAA 576 J to a third party till the final determination of the suit. The plaintiff was granted the orders and subsequently the defendants entered appearance on 14th May, 1999 and also filed the defence on the same day. Having obtained the orders, the plaintiff went to sleep till the present application was filed. Mr. Odongo further submitted that on 25th June, 2003, the application was placed before Hon. Justice Lady Lesiit though the same could not proceed due to the confusion over legal representation. Due to the above, the Judge directed that the application be served afresh. Subsequently, the defendant served both Orina, Advocate and Onduso. Unfortunately, the application was not heard on 9th March, 2004 since the Court was not sitting. The same fate met the application on 22nd March, 2004, 27th April, 2004 and 20th July, 2004.

Besides the above, Mr. Odongo further submitted that the plaintiff filed a replying affidavit purporting to respond to the application. The replying affidavit contained the following two points:

- *That the application had been overtaken by events because the plaintiff had taken a hearing date ex-parte almost a year after the application had been filed.*

- *Secondly, that Mr. Orina, Advocate needed one year to take instructions from his client.*

Mr. Odongo submitted that the plaintiff's attempt to obtain a hearing date for the main suit – knowing that there was a pending application is a gross abuse of the Court process.

On the other hand, Mr. Orina opposed the application on the ground that the same is fatally defective. According to Mr. Orina, it is trite law that a Notice of Motion or Chamber Summons must be supported by an affidavit because it touches on contentious issues. He was of the view that the affidavit of Mr. Mbaluka raises contentious issues that should be canvassed by the parties.

Secondly, Mr. Orina submitted that since the suit was initially defended by Mr. Mwangangi, Advocate, he should have been served with the Notice of Change of Advocate. Besides the above, Mr. Orina submitted that on 3rd February, 2004, his firm had invited Manyakih Advocate to come and fix a hearing date in Court – though they failed to turn up. In addition to the above, Mr. Orina submitted that the application has been overtaken by events since the suit has already been fixed for hearing.

Lastly, he submitted that the application suffers from the law of laches since the same has not been prosecuted for over a year and 5 months.

The Court has carefully perused the submissions that have been made by both Counsels. According to Order 16 Rule 5 Civil Procedure Code, it states as follows:

> ***If, within three months after –***
>
> ***(a) the close of pleadings; or***
>
> ***(b) in the High Court, an order for the hearing on a summons for directions, or***
>
> ***(c) the removal of the suit from the hearing list; or***
>
> ***(d) the adjournment of the suit generally, the plaintiff, or the Court of its own motion on notice to the parties, does not set down the suit for hearing, the defendant may either set the suit down for hearing or apply for its dismissal.***

In this particular case after the plaintiff got an injunctive order on 16th April, 1999 he never made any attempts to have the case heard till the present application was filed.

Consequently, on 12th January, 2004, the applicant filed the present application. In order to circumvent the said application, the respondent/plaintiff obtained a hearing date on 18th February, 2004.

This Court concurs with the applicant's Counsel that the above is a gross abuse of the Court process. Assuming that the respondent/plaintiff was keen on prosecuting the case then he could have got a date between 1999 to 2004. The delay in prosecuting the case is not only inordinate but also unreasonable. The plaintiff/respondent was obviously content with the injunctive orders that he obtained. In view of the above, I hereby dismiss the suit for lack of prosecution. Costs to the applicant in any event.

MUGA APONDI

JUDGE

25TH MARCH, 2005

Ruling read, signed and delivered in open Court in the presence of Mr. Olonyi for Mrs. Manyakih for applicant.

MUGA APONDI

JUDGE